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No. 755

Supreme Court of the United States

OCTOBER TERM, 1896.

GEORGE W. RUSS, Petitioner,

vs.

COUNT J. TELFENER.

Brief and Argument by said Telfener against Granting Writ of Certiorari.

J. L. PEELER, of Counsel.

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Brief and Argument by said Telfener against Granting Writ of Certiorari.

This case has been in this court twice before, and on both occasions the judgments were reversed in Telfener's favor. (See 145 U. S., 522, and 162 U. S., 170.)

It will be observed that Russ sues upon the identical contract that was exhaustively considered the last time this case was before this court, and that his bill, with a few slight amendments, remains the same. It will also be noted that counsel for Russ are citing and relying upon the very same authorities as were presented by them when the case was last here.

The opinion of the United States Circuit Court of Appeals, consisting of six lines, is as follows: "When this case was last before the Supreme Court of the United States, the contract upon which the plaintiff in error sues was fully examined, considered and construed, leaving, in our opinion, no ground upon which Russ, plaintiff below, plaintiff in error here, can maintain a suit thereon. The judgment of the Circuit Court was to this effect, and is affirmed." (Trans., 32.)

Now, we respectfully submit that there are five valid reasons why the writ of certiorari, prayed for by Russ, should be refused:

FIRST.

Russ not having had all the land surveyed, or the map and field-notes filed in the General Land Office on the 1st November, 1882, the date of the alleged contract, he owned no right that could be conveyed.

By reference to the last opinion of this court, it will be seen that the first paragraph is as follows:

"No right, title or interest in the lands which Russ desired and applied to purchase passed to him solely by his application for the survey. Until that was followed by the survey, map and field-notes of the survey, and they were filed in the General Land Office of the State, *it gave no right to the applicant to purchase the land.*" (162 U. S., 174.)

On examining the bill of Russ, it will be noted that the alleged contract purports to have been made on the 1st November, 1882, at which time there were *ninety-eight sections of land that had not been surveyed at all; that no map or field-notes to any of the* 1813 *sections had been filed in the General Land Office up to said date, and that they were not filed until* 67 *days thereafter, to-wit, 8th January,* 1883. (Trans., 5-10.)

Now, in view of that portion of the opinion quoted and of the bill referred to, what right, we ask, did Russ possess at the time of making the alleged contract, 1st November, 1882? What right could he convey? We answer, nothing.

SECOND.

The contract sued on shows that Russ agreed to sell Telfener his right to purchase from the State the entire tract of eighteen hundred and thirteen sections of land; not any particular portion thereof, but the entire tract; and it having already been shown that Russ did not own an interest in the entire tract—in fact, in none of it—hence an offer of any less by him than the entire

land, had it been made, would not have been a compliance with his contract with Telfener.

On this subject this court said:

"There is another view of this case which merits consideration. The contract between Russ and Telfener was for Russ to sell to the latter his right to purchase from the State the entire tract of eighteen hundred and thirteen sections of its public lands for which he had applied, not for any particular portion of that tract. Telfener had never proposed to take any less than the whole amount, nor contracted to do so. An offer of any less by Russ, had it been made, of which there is no evidence, would never have been a compliance with his contract with Telfener." (162 U. S., 175.)

Since this case has been in this court twice, in fact, after it had been pending for about thirteen years, and gone through four trials, Russ, for the first time, ingrafts in his bill a paragraph to the effect:

"That said contract was not conditioned upon the conveyance by plaintiff to defendant of any specific number of acres, and it was not intended by the parties thereto that the number of acres should be a material term of the contract, but it was understood and agreed in said contract, and also by the parties thereto at the time of making same, and as a part thereof, that said plaintiff was to convey about one million acres of land, more or less, and the conveyance or tender of that number of acres would have been a full compliance with said contract under the terms thereof and according to the contemporaneous understanding and agreement of the parties thereto." (Trans., 8.)

To this paragraph Telfener specially excepted upon the ground that the contract was not ambiguous, and that there was no fraud or mistake pleaded, and the Circuit Court properly sustained the exception.

THIRD.

To have acquired any right, it was the duty of Russ to have had the map and field-notes of each section re-

turned to and filed in the General Land Office within 60 days after the survey, and he having failed to do so, he can not now recover.

The bill avers that during the month of October, 1882, Russ caused all the lands to be surveyed except ninety-eight sections (Trans., 6), and that the map and field-notes to same were returned 8th January, 1883. (Trans., 11.)

Section 3 of the Act 14th July, 1879, provides as follows:

"It shall be the duty of the surveyor to whom application is made by responsible parties to survey the lands designated in said application, within three months from the date thereof, and within sixty days after said survey, to certify to, record, and map the field-notes of said survey; and he shall also within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases."

Hence, it is seen that the map and field-notes to these surveys were returned to and filed in the General Land Office eight days after the expiration of the time required by law.

Discussing this matter, this court said:

"Russ, the plaintiff, was to acquire of the State such interest in the property as would authorize him to sell and transfer to the defendant a valid title thereto, and to acquire such a valid title he was bound to make performance of his contract with the defendant by filing the surveys, maps and field-notes of the whole within the prescribed time, so that the defendant might have the right to demand patents of the State on payment of the purchase money of such property to its treasury, which he never did, and, therefore, released the defendant of all obligations to perform the alleged contract on his part. Authority for this position will be found in the cases of Bank of Columbia vs. Hagner (1 Pet., 465); Hill vs. Grisby & Smittle (35 Cal., 656), and Englander vs. Rogers (41 Cal., 421).

"It is only upon the return and filing in the General Land Office, as stated above, that any right to the land surveyed attaches to the applicant, and until such filing the State does not agree to part with any interest in the lands surveyed, and the purchaser does not acquire any." (162 U. S., 180-181.)

FOURTH.

Russ did not sell anything, and he can not recover anything.

On this subject, this court said:

"The claim that the plaintiff below, Russ, had parted with valuable property, for which he was entitled to a judgment exceeding half a million of dollars from Count Telfener, for having transferred to him his hopes of securing a million acres of land from the State, for which he did not hold any promise or obligation of the State, *does not merit consideration; as a claim, it rests upon no solid foundation.*" (162 U. S., 183.)

FIFTH.

Before Russ could obtain a vested right, he was required to pay the State for the land within the required time.

The bill shows that no payments were made or tendered to the State, and regarding this matter this court said on petition for rehearing:

"Some expressions in our former opinion implying that payment was a prerequisite to recovery are complained of. What we intended to say was that under the pleadings, and *on plaintiff's contention as it seemed to be pressed*, it was necessary that he should show that he had so far complied with the law as to have obtained a vested right to patents as against the State on making the required payments in the required time, and *this we thought he had failed to do* as to all the tracts, it being borne in mind that each tract must be treated as a separate purchase under the statute, as held in Bacon vs. State, supra, though this contract, as between the parties, was an entire contract for the transfer of rights in many tracts necessary to make up the agreed number of acres." (163 U. S., 100.)

But even if we should be wrong in our position upon this question, the sustaining of the demurrer by the court below is

a harmless error, because other portions of this court's opinion are fatal to any recovery.

We respectfully submit that the writ of certiorari should not be granted, or the judgments of the courts below disturbed.

J. L. PEELER,
Counsel for Count J. Telfener.